Supreme Court, U. S.
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No. 73-822

In the Supreme Court of the United States

OCTOBER TERM, 1973

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

MOTION TO DISMISS THE WRIT OF CERTIORARI

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, moves the Court to dismiss the writ of certiorari in this case. This motion is based on the ground that since the Economic Stabilization Act of 1970, 84 Stat. 799, has expired, the issue presented by this case no longer has prospective importance.

The question presented by the petition for a writ of certiorari is whether the Tenth Amendment of the Constitution bars the federal government from enforcing against the States, in their capacities as employers, general regulations of commerce that affect governmental and nongovernmental employers alike. In particular, petitioners challenge the validity of the Economic Stabilization Act insofar as that Act limited the extent to which the State of Ohio could increase the salaries of its public employees. The petition was granted on February 19, 1974. After the petition was granted, Congress

permitted the Economic Stabilization Act to expire at midnight on April 30, 1974.[1]

It appears unlikely that there will be significant litigation involving wages and salaries of state employees under the Act. The question presented here is at issue in only two other pending actions.[2] We have been informed by the Cost of Living Council that no proceedings raising this issue are pending before it. And no litigation of this nature can arise with respect to wages and salaries paid for periods after April 30, 1974. See Section 218 of the Act, as amended, 87 Stat. 29. The issue in this case, therefore, has no substantial continuing importance.

The general question of the federal government's power under the Commerce Clause to subject the States to commercial or economic regulation may of course arise in the future under different statutes. But we believe that this Court should reserve consideration of that general question until it arises in the context of an operative regulatory scheme of broad and continuing significance.

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[1]As orginally enacted, the Act would have expired on February 28, 1971. See Section 206 of the Act, 84 Stat. 800. The Act was then extended five times. 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38; 85 Stat. 743; 87 Stat. 27. The final extension was to April 30, 1974.

[2]The States of California and Missouri are currently litigating the question raised here. See *United States* v. *Missouri*, Civ. No. 1888 (W.D. Mo.); *United States* v. *California*, Civ. No. S74-186, preliminary injunction granted May 17, 1974 (E.D. Calif.). Apparently there is only one other action involving public employees, and the constitutional question presented here has not been raised in that case. *County of Nassau, New York* v. *Cost of Living Council*, Civ. No. 74-C-618 (E.D. N.Y.).

In short, we believe that this case is no longer appropriate for the exercise of this Court's certiorari jurisdiction under Rule 19 of the Rules of this Court. See, *e.g.*, *Morris* v. *Weinberger*, 410 U.S. 422; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70; *District of Columbia* v. *Sweeney*, 310 U.S. 631. The writ of certiorari should therefore be dismissed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.